Supreme Court, U.S.
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No. 95-482

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

PHYLLIS WOODALL, et. al.,
Petitioners,

v.

THE CITY OF EL PASO,
Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Fifth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

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2. Does Article I, Section 8 of the Texas Constitution provide greater protection than the First Amendment in the context of zoning laws that regulate the location of adult businesses?

LIST OF PARTIES

Counsel of record for Respondent City of El Paso ("El Paso") certifies that the following is a list of all parties to the proceedings in the United States Fifth Circuit Court of Appeals:

PHYLLIS WOODALL AND JEANNIE COUTTA,
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AND THE COSMOPOLITAN

SOLEDAD AGUAYO

HIROYOSHI IWABUCHI and LUZ IWABUCHI
Individually and D/B/A/ THE CABARET

ESTELA RODRIGUEZ

ENRIQUE VILLANUEVA, Individually and
D/B/A SWINGER'S BOUTIQUE

WILLIE CENICEROS, Individually and
D/B/A SWINGER'S CINEMA

JEDJO, INC. AND SMD ENTERPRISES, INC.,
D/B/A THE LAMPLIGHTER AND THE RED FLAME

MARC DIEDRICH

BRUCE SEIKO

THE CITY OF EL PASO

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THE CITY OF EL PASO,
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On Petition for Writ of Certiorari To The United States Court of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION

El Paso respectfully requests that this Court deny the Petition for Writ of Certiorari to review the judgment and order of the United States Court of Appeals for the Fifth Circuit entered in *Woodall v. City of El Paso*, 49 F.3d 1120 (5th Cir. 1995).

OPINIONS BELOW

The denial of Petitioners' Suggestion for Rehearing En Banc in the Court of Appeals for the Fifth Circuit was entered on June 22, 1995 and appears as Appendix E. The published opinion of the Court of Appeals was entered on April 14, 1995 in *Woodall v. City of El Paso*, 49 F.3d 1120 (5th Cir. 1995), ("*Woodall III*"), and appears as Appendix A.

CONSTITUTIONAL PROVISIONS AND ORDINANCES INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press . . .

U.S. CONST. Amend I.

Article One, Section Eight of the Constitution of the State of Texas provides in pertinent part as follows:

> Section 8. Every person shall be at liberty to speak, write or publish his opinion on any subject, being responsible for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press.

TEX. CONST. Art. I, §8.

COUNTERSTATEMENT OF THE CASE

A. Course and Proceedings Below:

On April 15, 1988, Phyllis Woodall, et. al. ("**Petitioners**"), commenced a civil rights action against El Paso in state court seeking damages and injunctive relief pursuant to 42 U.S.C. Section 1983, and under the First, Fourth, Fifth, Sixth and Fourteenth Amendments to the United States Constitution. The case was subsequently removed to federal court by El Paso and tried to a jury on January 11, 1990. During the first trial, Petitioners

stipulated that El Paso's ordinances contained facially valid time, place, and manner restrictions; therefore, the only issue presented to the first jury was whether El Paso's ordinances afforded Petitioners reasonable alternative avenues of communication.

In the first trial, a jury found (1) that 39 adult businesses operated in the City of El Paso on March 22, 1988; (2) that there were 1,165 acres of land which complied with El Paso's adult businesses ordinances; (3) that there were 59 sites which complied with El Paso's ordinances and which were reasonably available to adult businesses; and (4) that El Paso's ordinances, as applied to Petitioners, "did not effectively deny them a reasonable opportunity to open and operate their adult businesses." After trial, the trial court denied Petitioners' claims under Article I, Section 8, of the Texas Constitution.

On initial appeal, a panel of the Court of Appeals for the Fifth Circuit reversed and remanded, holding that the jury had been given insufficient instructions and that land cannot be reasonably available if its physical, economic, or legal characteristics make it impossible for any adult business to locate there. *Woodall v. City of El Paso*, 950 F.2d 255, 263 (5th Cir. 1992) ("*Woodall I*").

On rehearing, the Court of Appeals for the Fifth Circuit expressly rejected Petitioners' theory that land is not available for use by adult businesses, if it would be "unreasonable" to expect adult businesses to relocate there, and withdrew its entire discussion entitled "Unavailable Land Under *Renton*", contained in Part A of its original opinion (950 F.2d, at 258). *Woodall v. City of El Paso*, 959 F.2d 1305, 1306 (5th Cir. 1992), ("*Woodall II*"), *cert. denied*, _____ U.S. _____, 113 S. Ct. 304, 121 L. Ed. 2d 237.

On remand, the trial court considered and denied Petitioners' claim under Article I, Section 8 of the Texas Constitution, holding that, in the context of zoning laws regulating the location of adult businesses, the Texas Constitution does not provide any greater protection than the United States Constitution. (Record, Vol. 5, p. 1145.)

On retrial, Petitioners again stipulated that El Paso's ordinances were content-neutral time, place, and manner restrictions and that they served a substantial government interest. The second jury found that El Paso's ordinances effectively denied Petitioners a reasonable opportunity to open and operate their entertainment business, and also found that in 1988 and 1992 there were only 12 acres and 12 sites in the City of El Paso that complied with El Paso ordinances and which were reasonably available to adult businesses. The jury further found that there were 39 and 22 adult businesses in operation in 1988 and 1992, respectively. (Record, Vol. 7, pp. 1412-1413).

El Paso moved for judgment as a matter of law and for new trial. Both motions were denied by the trial court without discussion.

The judgment of the Court of Appeals for the Fifth Circuit which Petitioners seek to have reviewed was entered on April 14, 1995. Petitioners did not file a petition for panel rehearing. Petitioners did not file their Petition for Writ of Certiorari within ninety (90) days of April 14, 1995 as required by Rule 13 of the Rules of this Court. Petitioners filed a Suggestion for Rehearing En Banc. The Suggestion for Rehearing En Banc was denied by the Court of Appeals on June 22, 1995. The Court of Appeals treated the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing (Appendix E).

On appeal, the Court of Appeals for the Fifth Circuit reversed and rendered, holding that El Paso was entitled to judgment as a matter of law, that commercial viability is not a relevant consideration, and that the Texas Constitution provides no greater protection than the First Amendment in the context of land use restrictions of adult businesses. *Woodall v. City of El Paso*, 49 F.3d 1120 (5th Cir. 1995) ("*Woodall III*").

B. Statement of the Facts:

Beginning in 1978, El Paso passed a series of zoning ordinances regulating the location of adult businesses. EL PASO TEX. ORDINANCES 6169 (178), 8926 (1987), and 9326(1988) (Appendices, B,C, & D).

In April, 1988, El Paso police began issuing citations to those adult businesses found operating in violation of El Paso's ordinances. Petitioners filed suit in state court for damages and injunctive relief soon thereafter.

C. Petitioners' Misstatements of Fact:

El Paso respectfully submits that Petitioners have mischaracterized and misrepresented the evidence. On page 7 of their Brief, for example, Petitioners state that of the 1,135 acres that were potentially available, approximately 600 acres were without utilities, roads, or development. A thorough review of the evidence, however, will show that the 1,135 acres consisted of land in various stages of development, most, if not all, of which had access to roads, utilities and other necessary infrastructure.

There is no evidence in the record to support Petitioners' representations that the land described incorrectly by Petitioners as "developable land" approximated three-

tenths of the 158,397 acres that comprise the City of El Paso. The uncontroverted evidence is that all of the sites identified by El Paso had road access, had existing structures or had no physical impediments to building, and that utilities are normally put in at the time that roads are constructed. *Woodall III*, 49 F.3d at 1125.

As the Court of Appeals found, there was no evidence from which a reasonable inference could be drawn that the sites identified by El Paso were the only sites potentially available. *Id.* at 1126. The Court of Appeals further found that the zoning maps showed that each site identified by El Paso was part of a larger area of potentially available sites, and that virtually every site could be shifted to some other location without significantly affecting other sites or reducing the total number of sites available. *Id.* Petitioners' representation that Phyllis Woodall's testimony related to specific sites identified by El Paso rather than to general areas, is not supported by the evidence, and is inconsistent with the findings of the Court of Appeals.

The Petitioners' argument that, "there was substantial evidence offered from which the jury could have concluded that many of the sites identified by the City were not legally or physically available," (Petitioners' Brief, at 8), is not supported by the evidence. As the Court of Appeals correctly found, the photographs of the sites admitted into evidence showed that the sites had road access and that those sites without existing structures had no visible impediments to constructing a building. *Id.* at 1125.

In regard to Petitioners' statements that many of the sites had no roads, utilities, sidewalks, streetlights, or other infrastructure improvements, or that some of the sites were precluded by deed restrictions, insufficient parking, and lease commitments, (Petitioners' Brief, at 8), the record is wholly

devoid of any evidence supporting such representations. A review of the record supports the findings of the Court of Appeals that all of the sites specifically identified by El Paso had road access, utilities access, and that they either had existing structures or had no physical impediments to building. *Id.* at 1125. The Court of Appeals correctly further found that there was no evidence that any site was subject to a long-term lease which would remove any site out of the commercial real estate market. The Court of Appeals further found that there was no evidence that any site with road access was actually inaccessible to the general public, or that any site's parking problem could not be cured by Petitioners at a reasonable cost. *Id.* at 1126.

D. The Court of Appeals' Opinion:

In reversing the judgment of the trial court, the Court of Appeals for the Fifth Circuit found that although Petitioners presented evidence upon which a jury could have found that none of the sites were "commercially desirable", they presented scant evidence that the proposed sites were physically or legally unavailable, and virtually no relevant evidence at all about numerous alternative sites which were not specifically identified. The Court of Appeals consequently found that the jury's verdict was clearly against the great weight of the evidence. *Id.* at 1123.

The Court of Appeals reiterated its previous holdings that the fact that a site may not be commercially desirable does not render it unavailable:

> "It is not relevant that a relocation site will result in lost profits, higher overhead costs, or even prove commercially unfeasible for an adult business. There is no requirement that an adult business be able to obtain existing

> commercial sites at low cost and with market access to ensure its prosperity. **As we have stated time and again, commercial viability is not a relevant consideration."** (emphasis added).

Woodall III, 49 F.3d at 1124 (citing *Grand Brittain, Inc. v. City of Amarillo*, Texas, 27 F.3d 1068, 1069 (5th Cir. 1994); *Lakeland Lounge of Jackson, Inc. v. City of Jackson, Miss.*, 973 F.2d 1255, 1260 (5th Cir. 1992)).

The Court of Appeals further held that Petitioners' claims under the Texas Constitution should be analyzed under the same standard used under the United States Constitution. Petitioners argued that the standard announced by the Texas Supreme Court in *Davenport v. Garcia*, 834 S.W.2d 4 (Tex. 1992), for prior restraints should be expanded to land use cases involving adult businesses. The Court of Appeals found that there is no Texas authority to support that argument. The only Texas authority directly on point opted for the standard announced in *Renton*. *Id.* at 1128.

REASONS FOR DENYING THE WRIT

I. THERE ARE NO SPECIAL AND IMPORTANT REASONS FOR GRANTING THE WRIT.

There is no reason for this Court to grant the Petition for Writ of Certiorari. Petitioners have failed to articulate any special and important reasons justifying the exercise of this Court's judicial discretion in favor of granting the Writ. Sup. Ct. R. 10.

In holding that commercial viability is not a relevant factor in the constitutional analysis required by *Renton*, the

Court of Appeals faithfully followed this Court's holding in *Renton* that "the inquiry for First Amendment purposes is not concerned with economic impact." *Renton, supra* at 54. Petitioners' claim that commercial viability is a relevant consideration in the constitutional analysis required by *Renton* does not give rise to any special and important unresolved federal question issues. In rejecting Petitioners' theory that a site is only available if it would be commercially reasonable for an adult business to locate there, the Court of Appeals for the Fifth Circuit did not decide an important question of federal law which has not been authoritatively settled by this Court and the United States courts of appeals which have addressed the issue and applied the standard enunciated in *Renton*. *See Grand Brittain, Inc. v. City of Amarillo, Texas*, 27 F.3d 1068 (5th Cir. 1994); *Lakeland Lounge v. City of Jackson, Miss.*, 973 F.2d 1255 (5th Cir. 1992); *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993); *Woodall v. City of El Paso*, 959 F.2d 1305 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S. Ct. 304, 121 L. Ed. 237; *Alexander v. City of Minneapolis*, 928 F.2d 278 (8th Cir. 1991); *D.G. Restaurant Corp. v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991); *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (4th Cir. 1988).

The Court of Appeals' holding that Petitioners' claims under the Texas Constitution should be decided under the legal standard enunciated by this Court in *Renton* does not raise a federal question. The Court of Appeals correctly decided to defer to the Texas Supreme Court on the state constitutional question of whether the standard adopted by it in *Davenport v. Garcia*, 834 S.W.2d 4 (Tex. 1992), should be expanded to land-use cases involving adult businesses. Accordingly, there is no discretionary jurisdictional basis upon which this Court should review the judgment of the Court of Appeals.

II. THE DECISION OF THE COURT OF APPEALS IS CONSISTENT WITH THIS COURT'S HOLDING IN *CITY OF RENTON V. PLAYTIME THEATRES, INC.* AND DOES NOT CONFLICT WITH ESTABLISHED PRECEDENT.

After reviewing the evidence, the Court of Appeals for the Fifth Circuit correctly noted that El Paso's evidence was premised on the theory that a site is available if it is physically or legally available, pursuant to *Woodall II*, and that Petitioners, on the other hand, predicated their entire case on the theory that a site is available only if it would be commercially reasonable for an adult business to locate there. *Woodall III*, at 1123.

In holding that commercial viability is not a relevant consideration in the constitutional analysis under *Renton*, the Court of Appeals for the Fifth Circuit faithfully followed this Court's holding in *Renton*.

The legal standard for determining the constitutionality of adult business zoning ordinances, such as the one challenged in this case, was initially established by this Court in *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986), *reh'g* denied, 475 U.S. 1132, 106 S. Ct. 1163, 90 L. Ed. 2d 205 (1986). In *Renton*, this Court explicitly rejected the "commercially viable" theory and held that "the inquiry for First Amendment purposes is not concerned with economic impact." *Id.* at 54.

In *Renton*, this Court further held that requiring adult businesses to fend for themselves in the real estate market on an equal footing with other prospective purchasers and

lessees does not give rise to a First Amendment violation. *Id.* at 54. This Court further held that the First Amendment does not compel the government to ensure that adult businesses will be able to obtain sites at bargain prices. *Id.*

In *Renton*, adult businesses had argued, just like Petitioners claim, that since some of the available acreage was already occupied, or because most of the undeveloped land was not currently for sale or lease, there were no "commercially viable" sites, and therefore, the ordinance substantially restricted speech. *Id.* at 53-54, 106 S. Ct. at 932, 89 L. Ed. 2d at 41-42. In sustaining the validity of the Renton ordinance, this Court held that commercial viability or suitability was not a viable theory for attacking the validity of zoning ordinances. *Renton*, 475 U.S. at 54.

In his concurring opinion in *Young v. American Mini Theatres, Inc.*, Justice Powell stated:

> The constraints of the ordinance with respect to location may indeed create economic loss for some who are engaged in this business. But in this respect they are affected no differently from any other commercial enterprise that suffers economic detriment as a result of land-use regulation. The cases are legion that sustained zoning against claims of serious economic damage.

427 U.S. at 78, 96 S. Ct. at 2455, 49 L. Ed. 2d at 330 (Powell, J., concurring.)

The Constitutional approach enunciated by this Court in *Renton*, and correctly followed by the Court of Appeals, represents a fair and equitable balance between the constitutional right of adult businesses to open and operate,

and the right of local governments to curb the secondary negative land-use impact of such businesses. To adopt Petitioners' approach would place an extremely onerous, if not impossible, burden on local governments by requiring them to engage in site-by-site assessments of every possible relocation site in order to guarantee the success or profitability of adult businesses, i.e., local governments would be placed under the impossible burden of ensuring the commercial viability of adult businesses. The approach suggested by Petitioners would give an unwarranted advantage to adult businesses in the competition for available space in the real estate market. To ensure that sites be commercially viable as requested by Petitioners would require more than the First Amendment commands.

The Court of Appeals for the Fifth Circuit has consistently held that commercial viability is not a relevant factor in the constitutional analysis required by *Renton*. *Grand Brittain, Inc. v. City of Amarillo, Tex.*, 27 F.3d 1068 (5th Cir. 1994); *Lakeland Lounge v. City of Jackson, Miss.*, 793 F.2d 1255 (5th Cir. 1992); *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988); *FW/PBS, Inc. v. City of Dallas*, 837 F.2d 1298 (5th Cir. 1988).

Recently, the Court of Appeals for the Fifth Circuit recognized that there is a legal distinction between promising a commercially viable alternative site and affording a reasonable opportunity to operate an adult business at a new location, and held that *Renton* does not require that local governments ensure that adult businesses can obtain existing commercial sites at low cost and with market access to assure their prosperity. *Grand Brittain*, 27 F.3d at 1069-70.

In *Woodall I*, a panel of the Court of Appeals for the Fifth Circuit held that land cannot be reasonably available if its physical or legal characteristics make it impossible for any

adult business to locate there. *Woodall v. City of El Paso*, 950 F.2d 255, 263 (5th Cir. 1992). In footnote 5, the Court observed that "although [Petitioners'] proof and contentions at trial dealt exclusively with physical and legal unavailability, land may be unavailable if it is economically unsuitable because no adult business could possibly expect to profit by operating there." *Id.* at 261, n. 5. The Court of Appeals further noted, however, that since Petitioners had not contended that the general areas identified by El Paso were commercially unavailable, it did not decide whether land that is economically unsuitable is reasonably available. *Id.*

On rehearing, the Court of Appeals in *Woodall II* repudiated Petitioners' theory that land is not available for use by adult businesses if it would be "unreasonable" to expect adult businesses to relocate there. The Court withdrew its entire discussion entitled "Unavailable Land Under *Renton*", contained in Part A of its original opinion (950 F.2d, at 258). Thus, in *Woodall II*, the Court of Appeals for the Fifth Circuit expressly rejected the argument that sites and land areas must be commercially viable or suitable in order to be reasonably available. The holding in *Woodall III* is in accord with this prior law.

III. THE OPINION OF THE FIFTH CIRCUIT IS IN HARMONY WITH OTHER CIRCUITS.

Decisions of other circuit courts also hold that commercial viability is not a relevant constitutional issue under *Renton* . In *Alexander v. City of Minneapolis*, 928 F.2d 278 (8th Cir. 1991), the Court of Appeals for the Eighth Circuit held that the fact that adult businesses could not secure property meeting their economic or commercial criteria did not invalidate zoning ordinances under the second prong of *Renton's* two-prong analysis. The Court of Appeals

further held that the City of Minneapolis was not required to provide adult businesses with actual sites for relocation purposes, as long as the ordinance provided for "potential" sites and did not deprive plaintiffs of a "reasonable opportunity to open and operate." *Id.* at 284.

In another post-*Renton* decision, *Intern. Food and Beverage Systems v. City of Fort Lauderdale*, 794 F.2d 1520 (11th Cir. 1986), the Eleventh Circuit Court of Appeals held that economic impact was not the appropriate standard to apply in determining the constitutionality of adult business ordinances and noted that in *Renton*, "Justice Rehnquist does not say that the City may not limit alternative avenues of communication, but only that it may not limit such avenues unreasonably." *Id.* at 1526.

Petitioners' reliance on *Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524 (9th Cir. 1993), is wholly misplaced. In *Topanga*, the Court of Appeals for the Ninth Circuit did not hold that commercial viability is a relevant consideration. The Court simply enumerated several factors which may assist in determining whether a site may be considered part of the available real estate market. First, the Court acknowledged that the First Amendment only requires that a site be potentially available rather than actually available, but that the requirement of potentiality connotes genuine possibility. *Id.* at 1531. Second, the Court of Appeals held that relocation sites that are reasonably accessible to the general public may be part of the market. Third, manufacturing areas which have proper infrastructure may be included in the market. Fourth, as long as a relocation site suits *some* commercial enterprise, although not the "particular needs of an adult business," it too, may be part of the real estate market. *Id.* at 1531. Finally, the Court of Appeals held that commercially-zoned areas are part of the market.

Topanga does not support Petitioners' theory. As the Court of Appeals found, all of the sites and the more than 1,000 acres identified by El Paso are genuinely available, physically and legally, to commercial enterprises. The uncontroverted evidence shows that all of the sites and land areas are reasonably accessible to the general public, have access to utilities and public roads, suit some generic commercial purpose, and are commercially zoned. Thus, even the factors in *Topanga* are satisfied in this case.

If sites and land areas are available for commercial businesses in general, they are constitutionally available, and it is irrelevant if such proposed sites are not economically desirable for adult businesses.

IV. EL PASO WAS ENTITLED TO JUDGMENT AS A MATTER OF LAW.

The Court of Appeals did not err in holding that the jury's verdict was clearly against the great weight of the evidence and in rendering judgment in favor of El Paso as a matter of law.

The only evidence presented at trial regarding general land areas and sites that were physically and legally available for adult businesses was the testimony of Patricia Aduato, Planning Coordinator for El Paso's Department of Planning. Her uncontroverted testimony was that in 1988, there were approximately 1,135 net acres that were physically and legally available as potential relocation sites for adult businesses. (Transcript, pp. 3-177).

Aduato testified that the 1,135 acres were legally and physically available and were highlighted in red on El Paso's zoning maps. (Transcript, 2-41). Through Adauto's testimony, El Paso identified within the 1,135 acres, no less

than 66 possible sites as potentially available for the relocation of adult businesses. (Transcript, p. 2-202); *Woodall III*, *supra* at 1125, n.1. She testified that each of the circles shown on the maps represented a site of approximately one acre, and that all of the land areas designated in red were commercially zoned for the operation of adult businesses, and were available both legally and physically for the potential relocation of adult businesses. (Transcript, p. 2-98).

She further testified that all of the sites had access to public utilities and public streets. (Transcript, pp. 2-99, 2-200, 3-110). The undisputed evidence is that although forty-five (45) of the sites were vacant, they all had access to public streets and public utilities. The remaining 21 sites were occupied by buildings of various shapes and sizes which had access to public streets and utilities. (Transcript, pp. 2-99, 2-20, 2-42 through 2-168, 3-180 through 3-181).

Petitioners failed to present any evidence controverting the evidence presented by El Paso. Petitioners' expert witness, Jeffrey D. Jones, conceded that the sites were physically and legally available, but rejected them because they were not commercially suitable for the successful operation of an adult business. (Transcript, pp. 2-237, 2-247, 2-256 through 2-257, 3-2, 3-3).

Jones did not evaluate any sites other than those identified by El Paso. (Transcript, pp. 2-259, 3-22 through 3-24). His analysis of the sites was predicated on the premise that sites are not reasonable if they are not commercially viable. His assignment was to establish an "economic" criteria for the successful operation of adult live entertainment businesses within the City of El Paso and to study and analyze the sites identified by El Paso in the context of what he believed was the relevant *commercial*

market for adult businesses. (Transcript, p. 3-22). He had no opinion as to whether or not the ordinances in question provided for reasonable alternative avenues of communication. (Transcript, p. 3-8).

Upon a thorough review of the record, the Court of Appeals found that although Petitioners had presented extensive evidence that none of the sites identified by El Paso were commercially desirable locations for adult businesses, they presented scant evidence that the proposed sites were physically or legally unavailable, and virtually no relevant evidence regarding alternative sites not specifically identified by El Paso. *Woodall III* at 1123.

The Court of Appeals found, after a through review of the record, that all of the sites specifically identified by El Paso had road access, that utilities were put in at the time that the roads were constructed, and that all sites had existing structures or had no physical impediments to building. *Id.* at 1125. The Court of Appeals found that, although Phyllis Woodall had testified that some of the general areas identified by El Paso did not have roads, that the closest roads dead-ended in the middle of nowhere, and that some areas were covered with sagebrush and sinkholes, Woodall could not relate her testimony to any of the sites specifically identified by El Paso. *Id.* at 1125, n.2. The Court found, upon review of the photographs entered into evidence, that the specific sites identified by El Paso have road access, and that those sites without existing structures have no visible impediments to constructing a building. *Id.*

The Court of Appeals further found as "patently irrelevant" much of the evidence presented by Petitioners in regard to their reasons why they considered various sites unavailable. *Id.* at 1125. For example, although Petitioners claimed that some of the sites were unavailable because the

owner of the site would probably not rent or sell to an adult business, or because the site was occupied by a building that was occupied or leased, the Court of Appeals found the record devoid of any evidence supporting Petitioners' claims. The Court of Appeals found that although Petitioners claimed that some of the sites were unavailable because they were on less travelled roads, there was absolutely no evidence that any site with road access was actually inaccessible to the general public. *Id.* at 26.

The Court of Appeals found no evidence in support of Petitioners' claims that many of the specifically identified sites had no roads, utilities, sidewalks, streetlights, infrastructure, or that some of the sites were unavailable because of deed restrictions, insufficient parking, or lease commitments (Petitioners' Brief, at 8). The Court of Appeals found no evidence that surrounding sites suffered from any impediments that rendered them unavailable. *Id.*

The Court of Appeals further found that the collection of sites identified by El Paso was but one possible arrangement of locations for adult businesses, and that every site could be shifted to some nearby eligible location without significantly upsetting other sites or reducing the total number of sites available. *Id.* As stated by the Court, "if the suggested site proved physically or legally unavailable, there was another site next door or across the street that was also potentially available." *Id.*

A thorough examination of the evidence, even in the light most favorable to Petitioners, establishes as a matter of law that El Paso's ordinances provide constitutionally sufficient locations for adult businesses to open and operate. Petitioners' position that many of the sites are not constitutionally available because they are not commercially viable is simply not a relevant consideration in the constitutional analysis required by *Renton*.

V. THE TEXAS CONSTITUTION DOES NOT PROVIDE GREATER PROTECTION THAN THE FIRST AMENDMENT IN THE CONTEXT OF ZONING LAWS THAT REGULATE THE LOCATION OF ADULT BUSINESSES.

In the area of land-use zoning ordinances, Article I, Section 8 of the Texas Constitution does not provide greater protection than does the U.S. First Amendment. The test enunciated in *City of Renton v. Playtime Theaters, Inc.*, 475 U.S. 41, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986), is the controlling test for determining the constitutionality of El Paso's ordinances under the Texas Constitution. *Lindsay v. Papageorgiou*, 751 S.W.2d 544 (Tex. App.--Houston [1st Dist.] 1988, writ denied); *Maloy v. City of Lewisville*, 848 S.W.2d 380 (Tex. App.--Ft. Worth 1993, writ denied).

Petitioners rely on *Ex Parte Tucci*, 859 S.W.2d 1 (Tex. 1993), to argue that a higher standard applies. The Court in *Tucci*, however, applied the standard established in *Davenport v. Garcia*, 834 S.W.2d 4 (Tex. 1992). *Davenport* is a prior restraint case involving the validity of a gag order prohibiting a guardian ad litem from speaking in public or private to any of the children whose interest she represented in a lawsuit concerning allegations of toxic chemical exposure at a dump site. In holding that the trial court had illegally issued the gag order, the Texas Supreme Court stated that the trial court had engaged in an unconstitutional prior restraint under Article I, Section 8 of the Texas Constitution. The higher standard enunciated by the Court is limited to cases involving the prior restraint of pure speech.

It is clear from the language of *Davenport* that the Texas Supreme Court intended the standard enunciated in that case to apply only to cases involving prior restraints.

The Court did not hold that this standard should apply in cases involving free speech and land-use/zoning ordinances imposing time, place, and manner restrictions on adult businesses.

Tucci, like *Davenport*, is not a land-use/zoning ordinance case. A plurality of the court treated *Tucci* as a prior restraint case, not a "place" restriction on speech as alleged by Petitioners. *Tucci*, 859 S.W.2d at 8 n.15. The plurality therefore proceeded to apply the *Davenport* standard. *Tucci* therefore has no applicability to the case before this Court.

The two Texas cases which involved the state constitutionality of land use regulations relating to adult businesses have applied the same standard as that under the First Amendment. In *Lindsay v. Papageorgiou*, 751 S.W.2d 544 (Tex. App.--Houston [1st Dist.] 1988, writ denied). The owner and operator of a topless club sought to invalidate, under Article I, Section 8 of the Texas Constitution, a land-use zoning regulation that regulated the location of adult businesses in Harris County. In denying plaintiff's claims for relief, the Houston Court of Appeals stated that the guarantees of free speech and freedom of expression contained in Article I, Section 8 of the Texas Constitution, "are *identical* to the protection afforded by the First Amendment to the United States Constitution." *Lindsay*, 751 S.W.2d at 549 (emphasis added).

After the decision of the Texas Supreme Court in *Davenport*, the Ft. Worth Court of Appeals in *Maloy v. City of Lewisville*, 848 S.W.2d 380 (Tex. App.--Ft. Worth 1993, writ denied), upheld the validity of an injunction restraining the operation of adult businesses in the City of Lewisville, Texas. The Court cited *Lindsay* as authority, and held that the injunction was directed not to the content of any speech

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on the part of plaintiffs but toward obtaining compliance with the City of Lewisville's zoning ordinance, and therefore, the ordinance did not violate Article I, Section 8 of the Texas Constitution. *Id.* at 385.

The only two cases directly on point have opted for the substantial governmental interest test as stated in *Renton* that content-neutral time, place, and manner regulations are acceptable provided they serve a substantial governmental interest and do not unreasonably limit alternative avenues of communications. This Court should reject, as the Court of Appeals did, Petitioners' invitation to read the minds of the Texas Supreme Court Justices on the issue of whether the *Davenport* standard should be extended to apply in land-use regulation cases.

CONCLUSION

For the reasons set forth above, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

Phyllis **WOODALL**, et al., Plaintiffs,
Phyllis Woodall, et al., Plaintiffs-Appellees,

v.

The **CITY OF EL PASO**, et al., Defendants,
The City of El Paso, Defendant-Appellant.

Phyllis **WOODALL**, et al., Plaintiffs,

Phylliss Woodall, Jeannie Coutta d/b/a the Naked Harem, Jedjo, Inc., SMD Enterprises, Inc., d/b/a The Lamplighter d/b/a Red Flame and Marc Diedrich, President, Plaintiffs-Appellants,

v.

**The CITY OF EL PASO, et al.,
Defendants-Appellees.**

Nos. 93-8674, 93-8739

United States Court of Appeals,
Fifth Circuit.
April 14, 1995

Adult businesses challenged constitutionality of zoning ordinance that restricted their location, claiming that ordinance effectively denied them reasonable opportunity to open and operate. The United States District Court for the Western District of Texas, Emilio M. Garza, J., entered judgment on jury verdict for city and businesses appealed. The Court of Appeals, 950 F.2d 255, reversed and remanded. On remand the District Court, Lucius Desha Bunton, III, J., entered judgement on jury verdict for adult

businesses and enjoined enforcement of ordinance, and appeal was taken. The Court of Appeals, Robert M. Parker, Circuit Judge, held that: (1) jury had improperly determined that there were insufficient locations for adult businesses by counting only sites satisfying ordinance's spatial separation requirements where it would be commercially reasonable for adult business to be conducted; (2) record showed that there were enough sites for all adult businesses if correct standard, counting all sites which meet the spatial requirements of ordinance and were not barred by physical characteristics rendering them unavailable for any kind of development or legal characteristics excluding adult businesses, there were sufficient number of spaces for all then existing adult businesses; and (3) there was no higher standard to be satisfied under Texas Constitution than there was under Federal Constitution, before locations of adult businesses could be regulated.

Reversed and remanded.

Appeals from the United States District Court for the Western District of Texas.

Before HIGGINBOTHAM, SMITH and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

At issue in this case is the constitutionality of the City of El Paso's (the City) zoning ordinances (the Ordinances) regulating sexually-oriented or adult businesses. Shortly after the City began enforcing the Ordinances, various adult businesses and adult business owners (the Adult Businesses) filed suit seeking damages and injunctive relief. After this case was tried, appealed, reversed, remanded, and retried,

the jury returned a verdict in favor of the Adult Businesses. The district court entered a judgment awarding damages to the Adult Businesses and enjoining enforcement of the Ordinances against the Adult Businesses. The City appeals, contending that the jury could not have reached the verdict it did under the correct legal standard. The Adult Businesses cross-appeal, contending that the district court erred in applying only federal constitutional standards rather than the greater protections the Adult Businesses claim they enjoy under the Texas Constitution. We decide two issues on appeal: whether the City was entitled to judgment as a matter of law due to the lack of evidence that the Adult Businesses were denied reasonable alternative avenues of communication, and whether Article I Section 8 of the Texas Constitution provides greater protection under the circumstances of this case than that provided by the First Amendment to the United States Constitution. After a thorough review of the record, we conclude that the jury could only have reached its verdict based on an incorrect view of the law, and that there is no constitutional infirmity with the City's zoning ordinances. We also hold that the Adult Businesses are entitled to the same protection under the Texas Constitution as under the United States Constitution.

I.

In the 1970s the City of El Paso began passing a series of zoning ordinances regulating sexually-oriented or adult businesses such as adult bookstores, adult movies, topless bars and live nude entertainment establishments. By March, 1988, the Ordinances prohibited these businesses from locating within 1000 feet of churches, schools, residences, nurseries, parks, and each other. *See* El Paso, Tex.Ordinances 6169 (1978), 8926 (1987), 9326 (1988); El Paso, Tex., Code art. II § 20.08.080.A (March 1989).

In April, 1988 El Paso police began ticketing adult businesses which failed to comply with the Ordinances. The Adult Businesses filed suit in state court for damages under 42 U.S.C. § 1983 and for injunctive relief, alleging that the Ordinances violated the First and Fourteenth Amendments of the United States Constitution and Article I Section 8 of the Texas Constitution. The City removed the cause to federal court alleging jurisdiction under 28 U.S.C. §§ 1331 and 1343.

Erotic non-obscene printed matter, films, and live entertainment are sheltered by the First Amendment, but enjoy less protection than some other forms of speech, such as political speech. *TK's Video v. Denton County, Texas,* 24 F.3d 705, 707 (5th Cir.1994). Although the Constitution looks askance at attempts to regulate such "speech" based solely on its content, we distinguish between regulating the content and regulating the consequence of protected activity. *City of Renton v. Playtime Theaters, Inc.* 475 U.S. 41, 46-48, 106 S.Ct. 925, 928-29, 89 L.Ed.2d 29 (1986). A content-neutral time, place, or manner restriction must (1) be justified without reference to the content of the regulated speech; (2) be narrowly tailored to serve a significant or substantial governmental interest; and (3) preserve ample alternative mens of communication. *Id.*

The Adult Businesses stipulated in the first trial that the Ordinances contained facially valid time, place and manner restrictions, so the only issues presented to the first jury were whether the Ordinances afforded the Adult Businesses reasonable alternative avenues of communication and if not, what damages should be awarded. The jury returned a verdict in favor of the City, finding that 39 adult businesses operated in El Paso on March 22, 1988, that the Ordinances allowed for 59 adult business sites on 1,165 acres, and that the Ordinances had not denied the Adult

Businesses "a reasonable opportunity to open and operate their adult entertainment businesses." After the trial the district court dismissed the Adult Businesses' claims under the Texas Constitution.

On appeal, the Adult Businesses argued that the jury had been misled about the proper law to apply in answering the district court's special interrogatories. We reversed and remanded for a new trial, holding that the district court should have instructed the jury that land cannot be found to be reasonably available if its physical or legal characteristics made it impossible or any adult business to locate there. *Woodall v. City of El Paso,* 950 F.2d 255 (5th Cir. 1992) (*Woodall I*). We also ordered that the district court reconsider the Adult Businesses' claim under the Texas Constitution. The opinion in *Wooddall I* contained a lengthy discussion on the meaning of available land under *Renton,* which suggested that an alternative site is not reasonably available unless it is economically suited to the needs of adult businesses. *see id.* at 260-61.

On rehearing, we reiterated our prior holding that land with physical characteristics which render it unavailable for any kind of development, or legal characteristics which exclude adult businesses, may not be considered "available" for constitutional purposes under *Renton. Woodall v. City of El Paso*, 959 F.2d. 1305 (5th Cir. 1992) (*Woodall II*). We withdrew our prior discussion regarding economic unavailability and stated that we did not endorse the Adult Businesses' theory that land is not available for use by adult businesses if it would be "unreasonable" to expect adult businesses to relocate there.

Shortly before the second trial, the Adult Businesses filed a motion to reinstate their claims under the Texas Constitution. The district court determined that their rights

under the Texas Constitution mirrored those under the United States Constitution and denied the motion. On retrial, the parties again stipulate that the Ordinances were content neutral time, place and manner restrictions and that they served a substantial government interest. The parties also stipulated to the amount of damages to be awarded in the event of an outcome favorable to the Adult Businesses. At the close of the Adult Businesses' evidence, the City moved for directed verdict. The motion was denied and the matter was submitted to the jury. The jury was asked to determine the number of adult businesses in operation in 1988 and 1992, the number of sites and total acreage available in both of those years, and whether their Adult Businesses were denied a reasonable opportunity to open and operate their businesses. For 1988, the jury found that there were 39 adult businesses in operation, 12 sites available, 12 acres available, and that the Adult Businesses were denied a reasonable opportunity to open and operate their businesses. For 1992, the jury found that were 22 adult businesses in operation, 12 sites available, 12 acres available, and that the Adult Businesses were denied a reasonable opportunity to open and operate their businesses. The City timely filed a motion for judgment as a matter of law and for new trial.

The City appealed, contending that the Adult Businesses staked their entire case on principles espoused in *Woodall I*, withdrawn in *Woodall II*, and expressly repudiated in *Lakeland Lounge of Jackson, Inc. v. City of Jackson, Mississippi*, 973 F.2d 1255, 1260 (5th Cir. 1992), and that the jury rendered its verdict based on those wrong principles. The Adult Businesses filed a cross appeal, renewing their argument that the Texas Constitution provides them broader protections than the United States Constitution, and alleging that the district court erred in denying their motion to reinstate their claims brought under the Texas Constitution.

II.
A.

The City and the Adult Businesses tried this case under different views of the applicable legal standard. The City approached this case under the theory that a site is available unless it is physically or legally unavailable as we stated in *Woodall II*. The Adult Businesses apparently took their cue from the portion of this Court's opinion in *Woodall I* that was withdrawn in *Woodall II* as "unnecessary" to the Court's decision. The Adult Businesses' position at trial and on appeal has been that a site is only available if it would be commercially reasonable for an adult business, or, more equivocally, for some hypothetical "generic" retail business that has all the requirements of a topless bar, to locate there. In any event, the Adult Businesses' evidence overwhelmingly concerned whether a topless bar could expect to make a reasonable profit at a particular site.

It is plain after a thorough review of the record that the jury decided this case based on a misapprehension of the questions presented to it. The Adult Businesses' entire case was founded on the premise that it would not be commercially reasonable for an adult business, or more particularly a topless bar, to locate on the alternative sites proposed by the City. This was the theory of the case that the Adult Businesses presented to the jury in their opening statements, it is what the Adult Businesses argued to the jury, and to a lesser extent it is what the Adult Businesses argued on appeal. The Adult Businesses presented extensive evidence upon which a jury could have found that none of the sites suggested by the City were commercially desirable locations for adult businesses, but scant evidence that the proposed sites were physically or legally unavailable, and virtually no relevant evidence at all about numerous alternative sites not specifically designated by the City. The

jury's verdict is clearly against the great weight of the evidence. The Court must now determine whether the record is so devoid of evidence upon which the jury could have reached its verdict that the City was entitled to a judgment as a matter of law.

In determining whether the district court should have granted the City's motions for judgment as a matter of law, this Court must review the decision of the district court by examining all of the evidence before the jury and the reasonable inferences drawn from such evidence. The aim of the Court on review is to determine whether a rational jury could reach the conclusion that the jury actually reached. *Fields v. J. C. Penny Co.*, 968 F.2d 533, 536 (5th Cir. 1992). If the facts and reasonable inferences therefrom point so strongly and overwhelmingly in favor of the moving party that reasonable persons could not arrive at a contrary verdict, viewing the facts in the light most favorable to the party against whom the motion is made, and giving that party the advantage of fair and reasonable inferences which the evidence justifies, then a motion for judgment as a matter of law should be granted. *Hamilton v. Grocers Supply Co., Inc.* 986 F.2d 97 (5th Cir. 1993).

B.

The inquiry into whether the record contains evidence to support the jury's determinations begins with the meaning of the questions the jury was asked to answer. The jury was asked to determine how many alternative sites were reasonably available to the Adult Businesses under the Ordinances, and whether the Ordinances left reasonable alternative avenues of communication. In *Renton*, the Supreme Court set out two principles that infuse successive cases dealing with zoning ordinances restricting permissible locations of adult businesses: (1) the ordinances must allow

for reasonable alternative avenues of communication and (2) commercial viability is not a factor. 475 U.S. at 54, 106 S.Ct. at 932. In *Woodall II*, we interpreted *Renton* as standing for the proposition that "land with physical characteristics that render it unavailable for any kind of development, or legal characteristics that exclude adult businesses, may not be considered 'available' for constitutional purposes under *Renton*." 959 F.2d at 1306.

Physical availability may be thought of in terms of the cost of altering or developing the area to change its physical characteristics to make it suitable for some generic commercial enterprise. The relevant consideration is whether the physical characteristics of the site present an unreasonable obstacle to opening a business; an obstacle that can be overcome without incurring unreasonable expense does not make a site unavailable, but an obstacle that cannot reasonably be overcome renders the site unavailable. Thus, in determining whether there are sufficient sites available, the finder of fact may exclude land under the ocean, airstrips of international airports, sports stadiums, areas not readily accessible to the public, areas developed in a manner unsuitable for any generic commercial business, areas lacking in proper infrastructure, and so on. *See Topanga Press, Inc. v. City of Los Angeles*, 989 F.2d 1524, 1532 (9th Cir. 1993). However the fact that a site may not be commercially desirable does not render it unavailable. It is not relevant that a relocation site will result in lost profits, higher overhead costs, or even prove commercially unfeasible for an adult business. *Id.* at 1531. There is no requirement that an adult business be able to obtain existing commercial sites at low cost and with market access to ensure its prosperity. *Grand Brittain, Inc. v. City of Amarillo, Texas*, 27 F.3d 1068, 1069 (5th Cir. 1994). As we have stated time and again, commercial viability is not a relevant consideration.

See id.; *Lakeland Lounge*, 973 F.2d at 1260; *SDJ, Inc. v. City of Houston*, 837 F.2d 1268 (5th Cir. 1988).

The jury found that there were 39 adult businesses in operation in 1988 but only 12 sites available and only 12 acres available, and the jury determined that the Adult Businesses had been denied an opportunity to open and operate their businesses. The City contends that none of the jury's findings for 1988 is supported by the evidence. The jury also found that there were 22 adult businesses in operation in 1992 but only 12 sites reasonably available and only 12 acres available, and determined that the Adult Businesses had been denied a reasonable opportunity to open and operate their businesses. The jury's finding that 22 adult businesses were in operation is unchallenged, but the City contends that the jury's other findings relative to 1992 are unsupported.

Where a zoning ordinance requires that adult businesses maintain a certain distance from one another, merely knowing the number of acres available is not particularly enlightening. Assuming a 1000 foot separation requirement and that each business requires one acre, 100 available acres could support as few as two or as many as 100 locations depending on how the acreage is situated within the city and how the available acreage is utilized. We are therefore not particularly concerned with determining how much acreage was actually available. It is enough to note that the jury's findings on available acreage were clearly based on a misapprehension of the meaning of available land and that the findings find no support in the record. What is important is the number of adult business locations that the acreage will support given the spacing requirements. That is what determines whether there are sufficient alternative sites available and that is our focus in reviewing the sufficiency of the evidence.

D.

The City identified 50 specific sites meeting the Ordinances' spacing requirements which it contended were physically and legally available in 1988. The sites were located on 1433 acres of land complying with the Ordinances, though the City did not contend that all 1433 acres were physically and legally available. In addition to the 50 sites identified as available in 1988, the City identified 16 additional sites that had become available due to rezoning that it contended were physically and legally available in 1992 located on 1690 acres of land meeting the zoning requirements.[1] The uncontroverted evidence is that all of the sites specifically identified by the City had road access in 1992, that utilities were put in at the time that the roads were constructed, and that all sites either had existing structures or had no physical impediments to building.[2] The evidence for

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[1] Patricia Aduato (known as Patricia Garcia in *Woodall I*), El Paso's Planning Coordinator, stated that the City had identified 64 sites that were available in 1992, but this is clearly a misstatement. Aduato gave testimony about each of the 66 specific sites that the City contended were available and both the City and the Appellees entered into evidence photographs of all 66 sites.

[2] Phyllis Woodall testified that many areas identified by the City were undeveloped desert with no road access. She testified that some areas did not have roads or the closest roads dead-ended in the middle of nowhere, that some areas were covered with sagebrush and sinkholes, and that some had no utilities; but Woodall never tied her testimony to any of the specific sites identified by the City as available. Indeed she could not, because both the Adult Businesses and the City entered into evidence photographs of the specific sites identified by the City which indisputably show that the sites have road access and that those sites without existing structures have no visible impediments to constructing a building.

1988 was substantially the same, except that there was some evidence that three sites may not have had road access in 1988.[3]

The Adult Businesses advanced a number of reasons why they considered various sites unavailable. Some are patently irrelevant. The Adult Businesses claimed that some sites were unavailable because the owner of the site probably would not rent or sell to an adult business, or because the building was currently occupied or leased,[4] neither of which is of any obvious concern under *Renton*. *Renton's* prohibition against consideration of economic impact forecloses inquiry into whether a relocation site is only "potentially" as opposed to "actually" available. *Topanga Press*, 989 F.2d at 1529. The Adult Businesses' complaints about most sites amounted to nothing more than the fact that some of the sites were on less travelled roads or away from other commercial development, though there was no evidence

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[3] Patricia Aduato testified that, although all the roads appeared on 1988 zoning maps, she did not know whether the roads on which three of the proposed sites were located had actually been built at that time.

[4] We suggested in *Woodall I* that "[When a] business is operated pursuant to a lease that commits the property to the present tenant for its business purposes for a term of years, the property may be effectively unavailable to adult businesses or any business enterprise. Such a leasehold could legally bar appellants' use in the same manner as restrictive covenants or zoning prohibitions." 950 F.2d at 262. In *Topanga Press*, the Ninth Circuit expressed some mystification about this suggestion, but declined to pass on its correctness, and stated that "property is not 'potentially' available when it is unreasonable to believe that it would ever become available to a commercial enterprise." 989 F.2d at 1531. We need not speculate here about what lease terms would make a property unavailable to any commercial enterprise. The record is devoid of evidence that any site was subject to a long term lease, much less one with such terms as would take it out of the commercial real estate market.

that any site with road access was actually inaccessible to the general public. The Adult Businesses' only real objection to these sites was that they did not believe the locations could generate sufficient business to support a topless bar, which is to say that the Adult Businesses deemed them to be not commercially viable. *See Lakeland Lounge*, 973 F.2d at 1260; *see also D.G. Restaurant Corporation v. City of Myrtle Beach*, 953 F.2d 140 (4th Cir. 1991) (holding that ordinance that restricted adult businesses to a remote area of town away from other businesses and tourist areas did not violate *Renton*).

The Adult Businesses complained that some sites had existing structures that were unsuitable for any small retail business. In many cases these were large multi-tenant office-warehouse buildings, and the uncontroverted evidence was that retail businesses could and occasionally did locate in such buildings. A few sites were occupied by rather large single use building like a warehouse or factory, which could arguably be outside the commercial real estate market. The Adult Businesses also complained that some sites lacked adequate parking to meet the City's requirements for retail businesses, but made no attempt to show that any site's parking problem could not be cured at a reasonable cost. The Adult Businesses had other similar complaints about other sites. However, even if we agreed that the these sites suffered from defects so severe as to take them out of the commercial real estate market and render them physically unavailable, there was no evidence that surrounding sites suffered from the same impediments so as to render them likewise unavailable.

There is simply no evidence in the record from which a reasonable inference could be drawn that the sites proposed by the City were the only sites potentially available. Rather, the collection of specific sites suggested by the City was but

one possible arrangement of adult business locations that could coexist under the spacing requirements of the Ordinances. The zoning maps show that each site suggested by the City was part of a larger area of potentially available sites, and virtually every site could be shifted to some nearby location without significantly upsetting other sites or reducing the total number of sites available. In almost every case, if the suggested site proved physically or legally unavailable, there was another site next door or across the street that was also potentially available.

The Adult Businesses had the burden of proving that the Ordinances denied them a reasonable opportunity to open and operate their businesses by failing to provide reasonable alternative avenues of communication. To meet their burden, the Adult Businesses had to show that the areas left open to them were inadequate to satisfy the demand for adult business locations. Under the circumstances of this case, in order show that the number of adult businesses that could coexist under the Ordinances was smaller than the number of sites suggested by the City, the Adult Businesses had to show not only that a specific site was unavailable, but that its surrounding area was unavailable as well.

The Court can identify few proposed sites where there was even a suggestion that the site suffered from an impediment that might also reasonably be attributed to the surrounding area. Although Phyllis Woodall testified generally that the areas which the City claimed were available under the Ordinances lacked street access, were covered with sinkholes, or were otherwise unsuitable for any sort of development, the photographs of the specific sites entered into evidence by both sides make it clear that the actual sites suggested by the City and their immediate vicinity were not the areas about which Woodall testified. The record suggests only three situations in which the

evidence might support an inference that a specific site and its surrounding area were physically or legally unavailable: three sites and their surrounding areas may have been subject to reciprocal easements barring adult businesses, four sites may have been within 1000 feet of prohibited uses, and three sites might not have had road access in 1988. However, even assuming that there was sufficient evidence to support findings that all the aforementioned areas were actually unavailable, the Ordinances still left a sufficient area physically and legally available for at least forty adult businesses to operate simultaneously in 1988, and for significantly more in 1992. When we compare this with the jury's findings that there were 39 adult businesses in operation in 1988 and only 22 in 1992, we see that, as a matter of arithmetic, there were at all relevant times more "reasonable" sites available than businesses with demands for them. The Ordinances therefore afforded the Adult Businesses adequate alternative means of communication. *See Lakeland Lounge*, 973 F.2d at 1260.

III.

The Adult businesses contend that the district court erred in denying their motion to reinstate their claims under Article 1 Section 8 of the Texas Constitution. The Adult Businesses maintain that the standard for determining the validity of El Paso's Ordinances under the Texas Constitution and the United States Constitution are different, and thus they are entitled to pursue a separate claim under Texas Constitution.

Article 1, Section 8 of the Texas Constitution provides in the relevant part:

> Every person shall be at liberty to speak, write or publish his opinions on any subject, being responsible

> for the abuse of that privilege; and no law shall ever be passed curtailing the liberty of speech or of the press ....

Similarly, the First Amendment of the United States Constitution provides:

> Congress shall make no law ... abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

The Texas Supreme Court has held that free speech rights under the Texas Constitution may be broader than those provided by the Federal Constitution in certain cases. *E.g., Ex Parte Tucci*, 859 S.W.2d 1 (Tex. 1993); *Davenport v. Garcia*, 834 S.W.2d 4 (Tex. 1992); *O'Quinn v. State Bar of Texas*, 763 S.W.2d 397 (Tex. 1988); *Channel 4, KGBT v. Briggs*, 759 S.W.2d 939 (Tex. 1988). The Adult Businesses argue that under *Davenport* the free speech clause of the Texas Constitution requires the City to show that the Ordinances protect a "compelling government interest" and are the "least restrictive means" possible to protect this interest, whereas under *Renton* the United States Constitution only requires the City to show that the Ordinances protect a "substantial government interest" and do not "unreasonably limit" alternative avenues of communication.

The district court determined that the greater protections set out in *Davenport* apply only to prior restraints and not to time, place and manner restrictions in land use restrictions of sexually oriented businesses. The district court noted that *Lindsay v. Papageorgiou*, 751 S.W.2d 544 (Tex-App. - Houston [1st Dist.] 1988, writ denied), the only Texas case directly on point, held that the *Renton* standard applies under Texas Constitution as well as under the United

States Constitution. The Adult Businesses contend that the *Davenport* standard was extended to land-use cases in *Ex Parte Tucci*, 859 S.W.2d 1, and that *Lindsay* has been impliedly overruled. We are unpersuaded.

In *Tucci*, a plurality of Justices held that the *Davenport* standard should have been applied to a temporary restraining order which regulated abortion protest during the 1992 Republican Party Convention in Houston, Texas. The *Tucci* Court addressed the applicability of *Davenport* to restrictions on political protest. It did not address whether the more stringent standard was applicable in land-use cases involving adult businesses. The simple fact of the matter is that there is no direct Texas authority supporting the Adult Businesses' position that the *Davenport* standard should be expanded to land-use cases involving adult businesses, and the only Texas authority directly on point opted for the *Renton* standard. *See Lindsay v. Papageorgiou*, 751 S.W.2d 544 (Tex. App. - Houston [1st Dist.] 1988, writ denied), *see also Maloy v. City of Lewisville*, 848 S.W.2d 380 (Tex. App. - Fort Worth 1993, no writ). If the intermediate Texas courts are wrong about Texas law in this area, we are content to wait until the Texas Supreme Court corrects their error. We hold that the Adult Businesses' claims under the Texas Constitution should be determined under the same standard as used under the United States Constitution.

IV.

We conclude that the City was entitled to judgment as a matter of law, and that the district court did not err in denying the Adult Businesses' motion to reinstate their claims under the Texas Constitution. We therefore REVERSE and REMAND with instructions to dissolve the injunction entered by the district court prohibiting enforcement of the Ordinances and for entry of judgment in accordance with this opinion.

APPENDIX B

(City of El Paso Ordinance No. 6169,
dated February 21, 1978)

FIRST READING 6169
Date 1/7/78
illegible
Date 2/21/78
illegible

AN ORDINANCE AMENDING CHAPTER 25 (ZONING) OF THE EL PASO CITY CODE, THE PENALTY BEING AS PROVIDED IN SECTION 25-10 OF THE CODE

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

That the following new section be added to Chapter 25 (zoning) of the El Paso City Code:

Section 25-49 Regulation of Certain Businesses.

PURPOSES: In the development and execution of this ordinance it is recognized that some property uses, by their very nature, have serious objectionable characteristics, including devaluation of property, particularly when more than one of these uses is established in relatively close proximity to other such uses, or in close proximity to residential neighborhoods, churches or schools. Special regulation of the uses described in this ordinance is necessary to protect residential neighborhoods and other surrounding businesses from the blighting and downgrading effects of these uses, and to protect the health, welfare and safety and morals of citizens whose homes, businesses, churches and schools may be located near these uses. The primary purpose of this ordinance is to prohibit the described uses within one thousand feet of any area zoned "residential",

"planned unit development" or "mountain development", and to prevent the establishment of these uses within one thousand feet of each other, and to prevent the establishment of these uses within one thousand feet of any church or school, which would contribute to the deleterious effects sought to be avoided by this ordinance, such as property devaluation and exposure of children to sexually explicit materials.

Uses subject to these controls are as follows: adult bookstores, adult motion picture theaters, nude live entertainment clubs.

1. Application to establish any of the above regulated uses shall be made to the Zoning Administrator, who shall not approve any such request if there is already in existence one or more such regulated use within one thousand feet of the proposed site of the regulated use, or if the proposed site of the use is within one thousand feet of any area zoned "residential," "planned unit development" or "mountain development," or if the proposed site of the regulated use is within one thousand feet of any church or school.

For the purposes of this ordinance measurements shall be made in a straight line, without regard to intervening structures or objects, from the nearest portion of the building or structure used as a part of the premises of a regulated use to the nearest property line of a church, school or district zoned "residential," "planned unit development" or "mountain development."

The Zoning Board of Adjustment may, after public notice and hearing, grant a special exception to the provisions of this ordinance if the following findings are

made in addition to the requirements for obtaining special exceptions under any other applicable ordinance:

(a) That the proposed use will not be contrary to the public interest or injurious to nearby properties, and that the spirit and intent of this ordinance will be observed.

(b) That the establishment of a regulated use or an additional regulated use in the area will not be contrary to any program of neighborhood conservation or any improvement project.

(c) That all applicable regulations of this or any other ordinance or statute governing such use or similar uses will be observed.

2. It shall be unlawful to establish any use regulated by this ordinance if the proposed location is within one thousand feet of any district zoned "residential," "planned unit development" or "mountain development," if the proposed location is within one thousand feet of any church or school. The establishment of a church, school or district zoned "residential," "planned unit development," or "mountain development" within one thousand feet of a previously existing use regulated by this ordinance shall not render such use unlawful.

3. Definitions in this ordinance:

(a) Adult bookstore shall mean an establishment having as a substantial or significant portion of its stock in trade, books, magazines and other periodicals, and "peep shows" or film strips which are distinguished or characterized by their emphasis on pictorial or photographic representations of "specified sexual activities" or "specified

anatomical areas" (as defined herein) or an establishment with a segment or section devoted to the sale or display of such material.

A "significant or substantial portion" shall mean more than one-third of the stock in trade or sales of the described material in excess of $5,000 retail value per year.

(b) Adult motion picture theater shall mean an enclosed building or outdoor screen presenting material distinguished or characterized by an emphasis on matter depicting, describing or relating to "specified sexual activities" or "specified anatomical areas" (as defined herein) for observation by patrons of such establishments, and which offers such material for at least any 120 days in any 12-month period.

(c) Nude live entertainment club shall mean any bar, club, theater, lounge or establishment which offers live nude entertainment by dancers, models, actors, actresses, players, waitresses or waiters. Nude live entertainment shall mean live human dancers, models, actors, actresses, players, waitresses or waiters whose pubic area, buttock or genitals are exposed to the view of patrons at any time.

(d) Specified sexual activities shall mean:

(1) human genitals in a state of actual or simulated sexual stimulation or arousal;

(2) acts of human masterbation, sexual intercourse or sodomy;

(3) fondling or other erotic touching of human genitals, pubic region, buttock, or female breast;

(4) "sexual intercourse," "sexual contact", or "deviate sexual intercourse" as defined in Sec. 21.01 Texas Penal Code.

(e) Specified anatomical areas shall mean less than completely covered human genitals, pubic region, buttock, and female breast below a point immediately above the top of the areola.

(f) Church shall mean any building used for public worship on a regular and continuing basis by any religious denomination or sect.

(h) School shall mean any public, private or parochial institution which offers a course of instruction for any grades from kindergarten through the twelfth grade.

4. Amortization of nonconforming uses. Any use in conflict with the purposes or terms of this ordinance which is lawfully existing at the adoption of this ordinance shall be entirely discontinued and shall thereafter cease operation within five years from the date any such use becomes nonconforming under this ordinance. If such nonconforming use is discontinued, interrupted, or changed, any future use of such land shall be in conformity with the provisions of this ordinance. Amortization of uses not conforming to the provision prohibiting location of a regulated use within one thousand feet of another regulated use shall not be required unless required by some other provision of this ordinance or other law (e.g. location within one thousand feet of residential zone).

5. If any provision, section, subsection, sentence, clause or phrase of this ordinance, or the application of same to any person or set of circumstances is for any reason held

to be unconstitutional, void or invalid, the validity of the remaining portions of this ordinance or their application to other persons or sets of circumstances shall not be affected thereby, it being the intent of the City Council in adopting this ordinance that no portion thereof or provision, or regulation contained herein, shall become inoperative or fail by reason of any unconstitutionality of any other portion hereof and all provisions of this ordinance are declared to be severable for that purpose.

PASSED AND APPROVED this 21st day of February, 1978.

/S/
Mayor Pro-Tem

ATTEST:

/S/
City Clerk

APPROVED AS TO FORM:

/S/
Michael Spurlock
Assistant City Attorney

APPENDIX C

(City of El Paso Ordinance No. 8926,
dated February 10, 1987)

008926

AN ORDINANCE AMENDING SECTIONS 20.02.044 (ADULT BOOKSTORE), 20.02.540 (NUDE LIVE ENTERTAINMENT CLUB), 20.08.080 (ADULT BUSINESSES), AND 20.62.020 (NONCONFORMING USES AND STRUCTURES), OF TITLE 20 OF THE EL PASO CITY CODE (ZONING). THE PENALTY BEING AS PROVIDED IN CHAPTER 20.68 OF THE EL PASO CITY CODE

WHEREAS, it is the intent of the City Council of the City of El Paso to regulate the location of adult bookstores, adult motion picture theaters and nude live entertainment clubs, in such a manner as to diminish the negative secondary impacts of such uses on surrounding residential land uses while preserving a reasonable opportunity for such businesses to operate in locations which are appropriate for such uses; and

WHEREAS, the City Plan Commission held a public hearing on January 15, 1987, and made the following recommendations:

> Based on the report presented by the Department of Planning in conjunction with New Mexico State University, that adult entertainment businesses should be regulated in the Zoning Ordinance to protect neighborhood property values and to preserve the quality of life and character of these residential neighborhoods; and

WHEREAS, the City Council, at a public hearing on February 10, 1987, considered the matter of passage of an ordinance governing land use regulation of adult entertainment; and

WHEREAS, the City Council makes the following findings which for the basis for such land use regulation of adult entertainment uses:

1. Adult entertainment land uses should be regulated by zoning regulations to separate them from incompatible uses in the same manner as other land uses are regulated.

2. Property values in areas adjacent to adult entertainment land uses are adversely affected.

3. Location of adult entertainment land uses in close proximity to residential uses, churches, parks or schools is inappropriate land use, and decreases the quality of life in such areas.

4. There is a correlation between higher crime rates and concentration of adult entertainment land uses.

NOW, THEREFORE, BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

That Sections 20.02.044 (Adult Bookstore), 20.02.540 (Nude Live Entertainment Club), 20.08.080 (Adult Businesses), and 20.62.020 (Nonconforming Uses and Structures) of Title 20 of the El Paso City Code be and are hereby amended as follows:

Chapter 20.02
Article II. Definitions.
20.02.044, Adult Bookstore.

"Adult Bookstore" means an establishment having a majority of its stock in trade, books, magazines and other periodicals, and "peep shows" film strips, or video cassettes which are distinguished or characterized by their emphasis on pictorial or photographic representation of "specified sexual activities" or "specified anatomical areas" (as defined in this chapter), or an establishment with a section or segment devoted to the sale, rental or display of such material, where such section or segment comprises twenty percent (20%) or more of such establishment's stock in trade, sales or rentals.

20.02.540, Nude Live Entertainment Club.

"Nude live entertainment club" means any bar, club, theater, lounge or establishment which offers live nude entertainment by dancers, models, actors, actresses, players, waitresses or waiters. "Nude live entertainment" means live human dancers, models, actors, actresses, players, waitresses or waiters, exposing "specified anatomical areas" as that term is defined in this Code, to the view of patrons.

Chapter 20.08
Article II. Supplementary Use Regulations.
20.08.080, Adult Businesses.

A. No adult bookstore, adult motion picture theater or nude live entertainment club may be established within one thousand feet of the following:

1. A church.
2. A public or private elementary or secondary school.

3. A nursery school, kindergarten, child care center, day nursery or day care center.
4. A boundary of any residential district.
5. A public park adjacent to a residential district.
6. The property line of a lot devoted to any residential use.
7. Another adult bookstore, adult motion picture theater or nude live entertainment club.

B. For the purposes of this section, measurements shall be made in a straight line, from the nearest portion of the building or structure used as a part of the premises of a regulated use to the nearest property line of any uses listed in Section 20.08.080(A.).

C. Any adult bookstore, adult motion picture theater or nude live entertainment club lawfully in existence on February 10, 1987, and not in compliance with the zoning provisions of the City Code, shall be deemed as nonconforming use and shall comply with all of the provisions of the zoning code regulating such uses by February 10, 1988. In the case of any such uses being located within one thousand feet (1,000 ft.) of each other, the use first established and continually operating shall be allowed to continue to operate at it's location, provided such use complies with all other provisions of the zoning code.

[additional one year amort. period]

D. The subsequent establishment of any use set forth in Section 20.08.080(A.) above within one thousand feet of a previously existing use regulated by this section shall not render such use a nonconforming or unlawful use.

E. The regulations in this zoning code of adult bookstores, adult motion picture theaters and nude live entertainment clubs are intended to be land use controls meant to regulate the harmful secondary effects of such uses only, and shall not be construed as being intended to limit access by adults to sexually oriented material, activity or expression, protected by The First Amendment of The United States Constitution.

F. Signage. The owner or operator of an adult entertainment use may erect, construct and maintain signs allowed by and conforming with Chapter 20.66 of the City Code. No signs shall contain photographs, silhouettes, drawings or pictoral representations of any manner, and may contain only the name of the regulated establishment.

G. If any section, subsection, clause or any portion of the regulations in this zoning code regulating adult bookstores, adult motion picture theaters and nude live entertainment clubs is held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this code regulating such uses.

Chapter 20.62
20.62.020, Nonconforming Uses and Structures.

F. Any adult bookstore, adult motion picture theater or nude live entertainment club which is deemed nonconforming under Section 20.08.080 (C.) of Title 20 of this code, shall comply with all provisions of the zoning code regulating such uses by February 10, 1988.

1. Within thirty (30) days from February 10, 1987, the operator or owner of such permitted use shall file the name and location of the

operation with the Zoning Administrator of the City of El Paso.

2. The City Council may grant an extension for operation, of nonconforming uses beyond the time provided herein, if the owner of the existing enterprise proves that he is unable to recoup his investment in such existing enterprise by that date. In order to secure an extension of time, the secure an extension of time, the owner must submit to the City Clerk a written request for such extension on or before January 10, 1988. No application for extension received by the City Clerk after January 10, 1988 shall be considered. Such written request shall set forth the following information:

(a) the amount of the owner's investment in the existing enterprise through February 10, 1987;

(b) the amount of such investment that has been or will be realized through February 10, 1988;

(c) the life expectancy of the existing enterprise;

(d) the existence or nonexistence of lease obligations, as well as any contingency clauses therein permitting termination of such lease.

This information shall be supported by relevant documentary evidence such as financial statements and tax records. Copies of such documentary evidence must be attached to the request for extension. The City Clerk shall notify the applicant of the date and time of the City Council meeting at which time such request shall be considered by City Council.

PASSED AND APPROVED this 10th day of February, 1987.

/S/
Mayor

ATTEST:

/S/
City Clerk

APPROVED AS TO CONTENT:

/S/
Planning Department

APPROVED AS TO FORM:

/S/
Assistant City Attorney

ZNG3:028

APPENDIX D

(City of El Paso Ordinance No. 9326,
dated March 22, 1988)

009326

AN ORDINANCE AMENDING TITLE 20 (ZONING), SECTION 20.08.080 (ADULT BUSINESSES), OF THE EL PASO CITY CODE, CLARIFYING THE ACTIVITIES PROHIBITED BY THIS SECTION. THE PENALTY BEING AS PROVIDED IN SECTION 20.68.010.A OF THE EL PASO CITY CODE.

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF EL PASO:

1. That Title 20 (Zoning), Section 20.08.080 (Adult Businesses), of the El Paso City Code, be amended to read as follows:

A. No person shall own, operate or conduct any business in an adult bookstore, adult motion picture theater or nude live entertainment club that is located within one thousand feet of the following:

1. A church.
2. A public or private elementary or secondary school.
3. A nursery school, kindergarten, child care center, day nursery or day care center.
4. A university, college, vocational or business school;
5. A boundary of any residential district.
6. A public park adjacent to a residential district.

7. The property line of a lot devoted to any residential use.

8. Another adult bookstore, adult motion picture theater or nude live entertainment club.

B. For purposes of this section, the following definitions shall apply:

1. Conduct Any Business.
Any person who does any one or more of the following shall be deemed to be conducting business:

(a) Operates a cash register, cash drawer or other depository on the adult business premises where cash funds or records of credit card or other credit transactions generated in any manner by the operation of the establishment or the activities conducted therein are kept;

(b) displays or takes orders from any customer for any merchandise, goods, entertainment or other services offered on the adult business premises;

(c) delivers or provides to any customer any merchandise, goods, entertainment or other services offered on the adult business premises;

(d) acts as a door attendant to regulate the entry of customers or other persons into the business

premises; and

(e) supervises or manages other persons in the performance of any of the foregoing activities on the business premises.

2. Entertainment.
Any act or performance, such as a play, skit, reading, revue, pantomime, scene, song, dance, musical rendition or striptease, whether performed by employees, agents, contractors or customers. The term 'entertainment' shall also mean bartenders, waiters, waitresses or other employees exposing 'specified anatomical areas' or engaging in 'specified sexual activities' in the presence of customers.

3. Operator.
The manager or other natural person principally in charge of an adult business regulated in this section.

4. Owner or Owners.
The proprietor if a sole proprietorship, all partners (general and limited) if a partnership, or all officers, directors and persons holding ten percent (10%) of the outstanding shares if a corporation.

C. For the purposes of this section, measurements shall be made in a straight line,

from the nearest portion of the building or structure used as a part of the premises of a regulated use to the nearest property line of any uses listed in subsection A of this section.

D. Any adult bookstore, adult motion picture theater or nude live entertainment club lawfully in existence on February 10, 1987, and not in compliance with the zoning provisions of the City Code, shall be deemed a nonconforming use and shall comply with all of the provisions of the zoning code regulating such uses by February 10, 1988. In the case of any such uses being located within one thousand feet of each other, the use first established and continually operating shall be allowed to continue to operate at its location, provided such use complies with all other provisions of the zoning code.

E. The subsequent establishment of any use set forth in subsection A of this section within one thousand feet of a previously existing use regulated by this section shall not render such use a nonconforming or unlawful use.

F. The regulations in this zoning code of adult bookstores, adult motion picture theaters and nude live entertainment clubs are intended to be land use controls meant to regulate the harmful secondary effects of such uses only, and shall not be construed as being intended to limit access by adults to sexually oriented material, activity or expression, protected by the First Amendment of the United States Constitution.

G. Signage. The owner or operator of an adult entertainment use may erect, construct and maintain signs allowed by and conforming with Chapter 20.66 of the City Code. No signs shall contain photographs, silhouettes, drawings or pictorial representations of any manner, and may contain only the name of the regulated establishment.

H. If any section, subsection, clause or any portion of the regulations in this zoning code regulating adult bookstores, adult motion picture theaters and nude live entertainment clubs is held to be invalid or unconstitutional by the decision of any court of competent jurisdiction, such decision shall not affect the validity of the remaining portions of this code regulating such uses.

PASSED AND APPROVED this 22nd day of March, 1988.

/S/
Mayor

ATTEST:

/S/
City Clerk

APPROVED AS TO FORM:

/S/
Assistant City Attorney

APPROVED AS TO CONTENT:

/S/
Department of Planning,
Research and Development
ZNG6:003

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 93-8674

PHYLLIS WOODALL, ET AL.,
Plaintiffs,
PHYLLIS WOODALL, ET AL.,
Plaintiffs-Appellees,
versus
THE CITY OF EL PASO, ET AL.,
Defendants,
THE CITY OF EL PASO,
Defendant-Appellant.

No. 93-8739

PHYLLIS WOODALL, ET AL.,
Plaintiffs,
PHYLLIS WOODALL, JEANNIE COUTTA d/b/a/
THE NAKED HAREM, JEDJO, INC.,
SMD ENTERPRISES, INC.,
d/b/a The Lamplighter d/b/a Red Flame
and MARC DIEDRICH, President,
Plaintiffs-Appellants,
versus
THE CITY OF EL PASO, ET AL.,
Defendants-Appellees.

Appeals from the United States District Court
for the Western District of Texas

ON SUGGESTION FOR REHEARING EN BANC

(Opinion 04/14/95, 5 Cir., __ F.2d __)

(June 22, 1995)

Before HIGGINBOTHAM, SMITH and PARKER, Circuit Judges.

PER CURIAM:

(X) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. No member of the panel nor Judge in regular active service of the Court having requested that the Court be polled on rehearing en banc (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

( ) Treating the Suggestion for Rehearing En Banc as a Petition for Panel Rehearing, the Petition for Panel Rehearing is DENIED. The Court having been polled at the request of one of the members of the Court and a majority of the Judges who are in regular active service not having voted in favor (FRAP and Local Rule 35), the Suggestion for Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Robert Parker
United States Circuit Judge